LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

(24-E)

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

BRIEF IN REPLY TO "BRIEF IN SUPPORT OF MOTION TO AFFIRM" OF APPELLEE STUCK

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellant Lavine
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

PAGE

Brief in Reply to "Brief in Support of Motion to Affirm" of Appellee Stuck 1

Conclusion. The motion to affirm should be denied. The appeal of Anna Stuck should be dismissed..... 4

CASE CITED.

State Board of Election Commissioners, *et al.* v. Evers, *et al.*, 405 U.S. 1001 (1972) 3

STATUTE.

28 U. S. C. Section 1253 2

RULES.

Rules of the Supreme Court:

Rule 13 2

Rule 10, subdivision 4 2

Rule 16 3

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,
Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,
Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

BRIEF IN REPLY TO "BRIEF IN SUPPORT OF MOTION TO AFFIRM" OF APPELLEE STUCK

We note our opposition to the motion to affirm, filed February 11, 1974, made on behalf of appellee Anna Stuck.[1]

[1] Anna Stuck had intervened as a plaintiff in the District Court. The order of the District Court had granted summary judgment in her favor as a named plaintiff. Thus we refer to her as an "appellee".

We would have foregone further briefing at this time had appellee Stuck not sought to interject her appeal (from that part of the order of the Court below which denied retroactive welfare payments to her) into appellant Lavine's appeal (and the separate appeal of County Commissioner Lascaris [No. 73-1016] as well[2]) via her "Brief in Support of Motion to Affirm".

The Index to the Record on Appeal prepared by the Clerk of the United States District Court for the Northern District of New York shows that a notice of appeal on behalf of appellee Anna Stuck was filed in the District Court on November 12, 1973. In accordance with the provisions of Rule 13 of the Rules of this Court, the time for docketing the appeal heretofore taken on behalf of appellee Anna Stuck pursuant to 28 U.S.C., Section 1253, expired 60 days from the filing of such notice of appeal, to wit, on January 11, 1974. To the best of our knowledge, information and belief, no application for an extension of time to docket that appeal was made or granted, and such appeal has not been docketed in this Court.

Appellee Stuck now attempts to bring her appeal before this Court on the coat tails, as it were, of the appeals heretofore duly docketed by appellant Lavine and by County Commissioner Lascaris. We address ourselves solely to the propriety of such action on the part of appellee Stuck.

The "Brief in Support of Motion to Affirm" filed with this Court by appellee Stuck on February 11, 1974 recites (page 9):

[2] Pursuant to Rule 10, subdivision 4 of the rules of this Court, we have, as to Commissioner Lavine's appeal, designated County Commissioner Lascaris as an appellee. As to No. 73-1016 County Commissioner Lascaris is, of course, the appellant.

> "A notice of appeal from the decision of the three-judge Court was filed in behalf of Anna Stuck in this matter. No separate jurisdictional statement was filed since such a statement would have simply reiterated the lengthy jurisdictional statement of each of the Appellants and since the question of retroactivity is 'fairly comprised' within the questions set forth in the jurisdictional statements. Supreme Court Rule 15(1)(e)."

The attempt by appellee Stuck to perfect her appeal in such fashion should, it is respectfully submitted, be dismissed, not only for complete failure to comply with the rules of this Court, but also as an attempt to avoid the consequences of failure to timely docket such appeal or to request an enlargement of time to do so. This Court has excused late docketing in some cases, while refusing to do so in others. See *State Board of Election Commissioners, et al. v. Evers, et al.*, 405 U.S. 1001 (1972) (Mr. Justice Blackmun and Mr. Justice Rehnquist concurring; Mr. Justice Douglas dissenting). We know of no case, however, in which the absolute failure to docket the case, as in the case of the appeal of appellee Stuck, has been excused by the Court.

If the Court, in its discretion, should decide to entertain such appeal, it is respectfully requested (1) that the Court order the appeal of Anna Stuck docketed as a separate appeal, and (2) that appellant Lavine be granted time to file a motion to dismiss or affirm addressed thereto pursuant to Rule 16 of the Rules of this Court as he may be advised.

We respectfully submit, however, that the appeal heretofore taken by Anna Stuck by notice of appeal filed November 12, 1973 should be dismissed.

CONCLUSION

The motion to affirm should be denied. The appeal of Anna Stuk should be dismissed.

Dated: February 21, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant Lavine

RUTH KESLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel